Supreme Court, U.S.
FILED
JAN 13 1999
OFFICE OF THE CLERK

No. 98-873

In the Supreme Court of the United States

OCTOBER TERM 1998

JOHN CRANE INC.,

Petitioner,

v.

JOHN ABATE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Maryland Court of Special Appeals

PETITIONER'S REPLY BRIEF

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The brief in opposition in this case takes issue with virtually none of the points made in the petition. Respondents do not deny that the issue presented in the petition is an important and recurring one. They do not deny that, in the absence of clear guidance from this Court, the lower courts are in disarray and have issued conflicting decisions on the constitutional rules governing consolidated trials. Respondents do not deny that many courts fail to offer meaningful safeguards against jury prejudice and confusion in the setting of consolidated proceedings. And respondents do not deny the applicability of the principle that "at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process." *Sheppard* v. *Maxwell*, 384 U.S. 333, 352 (1966) (citation and internal quotation marks omitted).

Respondents also offer no reason to doubt that this case offers an appropriate vehicle with which to address this important question. They do not take issue in *any* respect either with our description of the trial or with our account of the proceedings below. They do not deny that the various elements of the trial challenged in the petition are typical of the increasingly ambitious (and increasingly common) consolidations that are used in mass tort actions. And they do not challenge our submission that the analysis used by the Court of Special Appeals is inconsistent with this Court's holdings.[1]

Having disputed none of these points, respondents offer only two arguments against review of the decision below. First, they assert that *no* method of selecting illustrative plaintiffs can violate due process, no matter how unfair that method is, unless the size of the judgment obtained by the illustrative plaintiffs is used to determine the amounts that

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[1] They also do not deny that the decision below is final as it relates to the illustrative plaintiffs. That plainly is so; as we noted in the petition (at 14), all that remains undone in their cases is payment of the judgments.

will be awarded to other plaintiffs in the future. Second, they appear to contend that the introduction of prejudicial and confusing evidence in a consolidated trial is constitutionally irrelevant so long as the number of plaintiffs who receive judgments in the case is relatively small. These contentions, however, are plainly wrong. And whatever may be said in support of respondents' arguments on the merits, they offer no reason to avoid review of the question presented in the petition: how to prevent and correct denials of due process in consolidated proceedings.

A. Allowing Plaintiffs' Counsel To Select "Illustrative" Plaintiffs Without Any Involvement By The Defense Denies Defendants Due Process

We showed in the petition (at 3-4, 10) that the method used to select the "illustrative" plaintiffs in this case was patently unfair: they were chosen by the plaintiffs' lawyers with *no* participation by the defense, and included two atypical plaintiffs who suffered from a very rare and invariably fatal disease that did not afflict *any* of the common issues plaintiffs. We also explained (at 14) that the question of how to choose illustrative plaintiffs is a recurring one of growing importance. Respondents deny none of this. Instead, they assert that John Crane received due process because "there was no linkage between the verdicts in the trial plaintiffs [*sic*] cases and the other consolidated plaintiffs' claims" (Br. in Opp. 5), and "the trial plan contemplates that each individual consolidated plaintiff must prove each and every element of his cause of action in a separate trial before a jury" (*id.* at 9). But this contention is wrong.

First, respondents entirely miss the central point. Our principal contention for present purposes is *not* that the presence of nonrepresentative "illustrative" plaintiffs prejudiced the cases of the *common issues plaintiffs* (although that surely also is true). Our actual submission is that presenting the cases of the nonrepresentative "illustrative"

plaintiffs along with those of thousands of common issues plaintiffs prejudiced the jury *in the cases of the "illustrative" plaintiffs themselves*. As we explained in the petition (at 11), telling the jury that the "illustrative" plaintiffs' cases raised issues typical of those in asbestos suits, while simultaneously showing the jury that thousands of additional asbestos cases against John Crane are in the litigation pipeline, doubtless led jurors to believe that many of the plaintiffs in those cases would meet painful and lingering deaths from mesothelioma. The inevitable prejudice against the defendant that followed from this (erroneous) conclusion necessarily affected the outcome in the cases of the "illustrative" plaintiffs. This danger also was a concern in *In re: Chevron U.S.A. Inc*, 109 F.3d 1016 (5th Cir. 1997), in which the defendant "believed that a trial using such a skewed sample would * * * warp the jury's perspective regarding each individual claim." Faulk, Meadows & Colbert, *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH. L. REV. 779, 785 (1998). The relationship of the "illustrative" verdicts in this case to liability in any future proceeding therefore is irrelevant to our argument. Respondents *make no response at all to this point*.[2]

Second, respondents' contention as to those future proceedings is wrong on its own terms. Respondents assert that each consolidated plaintiff "must prove each and every element of his cause of action in a separate trial before a jury." Br. in Opp. 9. But the court below specifically held to

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[2] Respondents also are incorrect in asserting that we would require "statistical certainty in the selection of trial plaintiffs." Br. in Opp. 5. That is not our submission (although it was the holding of the Fifth Circuit in *Chevron*). Instead, we contend only that a method of selection that wholly excludes the defense and makes no attempt at all to choose "illustrative" plaintiffs who are typical of most of the plaintiffs in the case does not comport with the requirements of due process.

the contrary, deciding that, although common issues plaintiffs would have to establish individual causation and damages in coming "mini-trials," "[t]he new juries will *not* be called upon to determine whether the defendants were negligent or whether any specific products were defective — those matters were determined by the *Abate II* jury." Pet. App. 33a (emphasis added). The prejudicial use of nonrepresentative "illustrative" plaintiffs therefore will infect the cases of all of the 1300 common issues plaintiffs by foreclosing the defendant's ability to defend on issues that due process principles mandate should not be foreclosed.[3]

B. Procedures That Permit The Introduction Of Prejudicial And Confusing Evidence Deny The Parties Due Process

1. Respondents also avoid coming to grips with the more fundamental failure of due process in this case: the introduction of a substantial volume of evidence that was prejudicial and confusing as to particular defendants. Among

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[3] Respondents similarly miss the point in contending that *Chevron* has no bearing here because, in asserted contrast to this case, "the result of the verdicts in the bellwether plaintiff cases was intended to set the responsibility of *Chevron* to all consolidated plaintiffs." Br. in Opp. 8. As we have explained, the verdict below (like the verdict in *Chevron*) *does* establish the defendant's responsibility for negligence or product defect for all consolidated plaintiffs. Conversely, as we showed in the petition (at 12 & n.11), although the individual bellwether verdicts in *Chevron* would be used to encourage settlement in the cases of the remaining common issues plaintiffs, those verdicts (like the verdicts below) would *not* definitively establish the amount of the defendant's liability to those plaintiffs; as in this case, "the individual causation and damage issues of the remaining *un* selected plaintiffs would be determined subsequently in individual trials." *Cimino* v. *Raymark Indus., Inc.*, 151 F.3d 297, 318 (5th Cir. 1998) (emphasis in original). Respondents again make no response to this point.

other things, we showed in the petition that the jury heard evidence against more than 30 direct and cross-defendants; that the direct or cross-claims involved hundreds or thousands of products that were the subject of widely varying defenses; that the jury was exposed to a very significant amount of damaging evidence about asbestos manufacturers and worksites that were wholly irrelevant to the "illustrative" plaintiffs' claims; that the defendants below were associated by the trial court and by the plaintiffs with other entities that *already* had been found liable by other juries — and that the jury in this case was so informed; that the trial court failed to identify for the jurors the specific defendants or cross-defendants against whom particular evidence was introduced; and that only a small portion of the eight-month trial was devoted to John Crane's case, meaning that its defense was overwhelmed by the flood of irrelevant and prejudicial evidence concerning other parties. See Pet. 4-5, 15-17. We also noted that complex consolidated proceedings involving these sorts of elements have become common. Respondents do not take issue with any of this.

Instead, respondents maintain that the confusing nature of the proceedings and the prejudicial nature of the evidence introduced in the cases of the cross-defendants is constitutionally *irrelevant*, resting their position on the following assertion: "[t]he complexity of a case such as this is measured by the number of plaintiffs whose cases are tried to final verdict." Br. in Opp. 9. Because "only" five plaintiffs went to final verdict, respondents continue, the consolidation could not have denied John Crane due process. *Id.* at 10-11. But this contention ignores the elephant in the living room. The jury was bathed in confusing and prejudicial evidence that made it impossible for John Crane to receive a rational jury deliberation and a fair verdict; it surely is beside the point that the vast bulk of this evidence was introduced by cross-plaintiffs rather than by the "illustrative" plaintiffs. Apart from the *ipse dixit* statement of their rule, respondents

offer no reason to believe otherwise.

2. Respondents also contend that the decision below is consistent with *Malcolm* v. *National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993), because *Malcolm* involved a larger number of trial plaintiffs and jobsites than does this case. Br. in Opp. 10. We noted in the petition (at 22-24), however, that the *legal principle* announced in *Malcolm* is irreconcilable with the holding below: the Second Circuit found consolidation to deny due process when "there is an unacceptably strong chance" that the proceedings confused the jury (995 F.2d at 352), while the Court of Special Appeals in this case required a particularized showing that the jury was in fact biased or confused — a very different standard. See Pet. App. 20a. Respondents make no response at all to this point.

In addition, respondents' attempt to distinguish *Malcolm* on factual grounds is unavailing. To be sure, more individual plaintiffs were consolidated at the outset of the *Malcolm* trial than at the beginning of the trial in this case. But the liability trial in *Malcolm* actually was shorter than the one in this case (six months as against seven) (see 995 F.2d at 348); and only two trial plaintiffs remained in the case at the time the jury rendered its liability verdict in *Malcolm* (see *ibid.*), as against five who remained in this case. Moreover, each of the considerations identified by *Malcolm* as leading to jury confusion — variations in workplace, occupation, time of exposure, and nature of disease, as well as the death of some of the plaintiffs — is present in this case as well. See *id.* at 350-351. In fact, what this debate demonstrates most clearly is the need for guidance from this Court on the nature of the required due process inquiry when consolidation is challenged as unduly prejudicial and confusing.

3. Finally, respondents assert (at Br. in Opp. 11-17) that review is inappropriate because John Crane has not established jury confusion or prejudice as a matter of fact.

But this contention again misses the point. The petition does not seek review of particular factual findings by the Court of Special Appeals (although many are highly questionable); instead, our submission is that this Court should provide guidance on how to determine whether the probability of jury confusion and of prejudice to the defendant renders the proceeding "inherently lacking in due process." *Sheppard*, 384 U.S. at 352 (citation and internal quotation marks omitted). Having said that, however, it may be added that respondents' factual contentions are incorrect.

First, respondents assert (at Br. in Opp. 12-15) that the reversal of many of the jury's findings does not demonstrate jury confusion. We confess to finding respondents' contentions on this point — which are offered without the benefit of any citation to the record — a little opaque. To offer just one example, the petition (at 23-24 n.20) notes that, so far as starting dates of liability are concerned, the jury found liability to attach years before many defendants began to manufacture the products in question (and, in one case, a decade before the defendant manufactured or sold *any* asbestos product). The court below set aside these determinations because they were inconsistent with the "uncontroverted evidence" (Pet. App. 36a) and announced that it "cannot explain" the jury's reasoning, but speculated that "[i]t may well be * * * that the jury simply rejected the defendants' evidence as to when they began manufacturing or using particular products." *Ibid.* This observation hardly inspires confidence that the jury had a terribly clear idea of what it was doing.

Second, respondents contend that the jury could not have been confused because it distinguished between John Crane's gasket and packing products, holding John Crane liable only for its packing. Br. in Opp. 11-12, 15. In fact, however, this point demonstrates the *irrationality* of the jury's verdict. Respondents assert that a document that was crucial to the jury's determination was an air monitoring report describing

air quality at John Crane's manufacturing plant (a document that, although labeled essential to the jury's decision by respondents, was nowhere cited by the court below in its 135-page decision reviewing the verdict). *Id.* at 11, 15. This same document was introduced into evidence in the *Scribner* case cited by respondents at Br. in Opp. 11. But the *Scribner* jury found John Crane liable for its *gaskets* — precisely the opposite of what the jury determined in this case. Moreover, although the jury below found that John Crane's gaskets were *not* defective, the evidence indicated that the "illustrative" plaintiffs (to whom the jury awarded millions of dollars) were exposed *only* to gaskets and not to packing.[4] We suggest that this verdict was the understandable product of jury confusion.

* * * *

This discussion of the record should not divert attention from the disagreement over legal principle that is at the heart of this case. Although respondents attempt to justify the jury's verdict, they do not — and could not — deny that the jury was subjected to a wealth of confusing and prejudicial evidence. They accordingly are candid about the nature of their fundamental submission, contending that "practical resolution of multiparty litigation requires that the trial courts have *unfettered discretion* in formulating * * * trial plans." Br. in Opp. 16 (emphasis added). The court below took essentially the same position. We disagree; in our view, the

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[4] See John Crane Ct. App. Br. 3-12 (citing record). In response to this evidence, the Court of Special Appeals cited a page from a John Crane catalog that the court read to indicate that gaskets may be cut from packing; the court then hypothesized that the "illustrative" plaintiffs were exposed to asbestos during that process. Pet. App. 39a-40a. But plaintiffs' counsel never made that argument to the jury, and it is simply incredible to suggest that the jury reached this conclusion from a single, brief exposure to the catalog — which jurors were shown for a different purpose — that occurred during the course of an eight-month trial.

Constitution precludes use of consolidation procedures that are inherently lacking in due process. Because this issue is one of great and increasing practical importance, arises in a litigation context where this Court has yet to provide clear guidance, and involves rights that are of fundamental importance to innumerable litigants in jurisdictions across the Nation, review of the decision below is in order.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1999